IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1358

McALLISTER LIGHTERAGE LINE, INC., as claimant of the Tug G. M. McALLISTER,

Petitioner,

—against—

P. DOUGHERTY COMPANY, as owner of the Barge HARFORD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WILBUR E. DOW, JR.,
WILLIAM G. SYMMERS,
Proctors for Petitioner.

THE COURT PRESS, N. Y. C.

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Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, McAllister Lighterage Line, Inc., (claimant-respondent-appellant below), as owner of the tug G. M. McALLISTER, prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, to review a decision of that Court rendered on February 7, 1947 (R. 113), affirming an interlocutory decree of the United States District Court for the Eastern District of New York in favor of P. Dougherty Company, owner of the seagoing barge HARFORD.

A. Summary and Statement of Matter Involved.

This is a proceeding in admiralty instituted by the owner of the barge Harford to recover from petitioner, owner of the tug G. M. McAllister, damages sustained by the barge after she had been left at her destination, at anchor and fully afloat, in consequence of the subsequent stranding of the barge, first at her original anchorage berth, and later at a point further inshore to which the barge dragged during a storm.

The contract of towage was for petitioner to "take the barge Harford from Red Hook Flats to the anchorage off Port Reading Coal Docks" (R. 71-72). In fulfillment of the contract, the tug G. M. McAllister took the barge, manned by a crew of four, to the usual, customary and only anchorage at the destination directed by the barge owner, and left her there at anchor, on a rising tide, fully afloat, at a berth accepted by the barge master. The berth was the best available within the anchorage grounds, but on a falling tide and changing wind, the stern of the barge at some later time might have touched mud bottom.

There was no place within the designated anchorage where the barge would not touch bottom at low water at some point in the perimeter of her normal swinging circle (R. 116).

The District Court found that the barge did in fact swing and strike mud bottom on the falling tide (R. 98). Later, following a severe storm, the barge dragged further ashore, to a point from which it took some days to free her. Petitioner was found liable, by the Courts below, for all damages including those incident to the barge's dragging anchor.

It is not to be disputed that the barge was delivered to the best available berth at the destination directed by the barge owner. It was established below and is not disputed that the barge owner had been sending its barges, similar in type and size to the HARFORD, to the same anchorage grounds for more than 25 years. It was conceded that the barge master accepted the berth in that he made no inquiries, voiced no objection, and asked no instructions from the tug.

The Circuit Court of Appeals held that the tug was charged with knowledge (which it did not and could not have) (1) of the actual draft of the barge; (2) that the barge master was ignorant of depths and tides at the anchorage grounds; (3) that the barge would remain at anchor for an indefinite time or at least throughout the next ebb tide. The Court held that the tug captain owed an *affirmative* duty (a) to instruct the tow as to the method of anchoring, the number of anchors and the length of anchor chain to be used; (b) to warn the tow of conditions later to be encountered at the customary anchorage habitually used by the barge owner (R. 116).

B. JURISDICTION.

The date of the judgment of the Circuit Court of Appeals to be reviewed is February 7, 1947 (R. 119). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. Code Sec. 347 (a)), and under General Rule 38 of this Court, Section 5, subdivision (b).

C. Opinions Below.

The opinion of the District Court is at page 91 of the record and is unreported. The opinion of the Circuit Court of Appeals is at page 113 of the record, and is reported in 159 Fed. (2d) 486 (*The Harford*).

The District Court concluded (1) it was the duty of the tug to bring the barge "to anchor at a point where she would be reasonably safe in all conditions of tide and wind reasonably to be anticipated and to anchor the Harford at a point where" she would remain afloat under all "reasonably to be anticipated conditions"; (2) that the tug was negligent in failing to place the barge "at a safe anchorage"; and (3) that the barge was guilty of "no fault or negligence" in accepting the anchorage berth at the destination directed by her owners or in connection with the subsequent dragging of the barge inshore (R. 99-100).

The Circuit Court of Appeals affirmed the conclusions of the District Court, although it correctly stated petitioner's contention, as follows:

> "The appellant contends that the tug performed her whole duty when she placed the barge at the destination directed by the barge-owner in a position as safe as the conditions at such destination would permit."

The Circuit Court of Appeals disagreed with this contention however, and held the tug at fault because "the tug gave her (the barge) no instructions how to anchor and no warnings that she would take ground if swung on a single anchor" (R. 116).

The Circuit Court of Appeals further concluded

that the tug captain's "orders were to put her (the barge) in a *safe* berth", and that "if anchored fore and aft, she could have ridden safely" (R. 117). No Court has ever before imposed an obligation on a tug to instruct a towed vessel to "anchor fore and aft" (R. 125); there was no evidence whatsoever at the trial as to such practice, or to indicate such method of anchorage was possible. As a matter of fact, the barge, like all similar barges, had only anchored forward. The contract of towage, moreover, said nothing about a "safe berth", nor was any evidence offered to show the meaning of "safe berth" assuming such condition were read into the contract. Petitioner prayed a rehearing to establish the fact that the barge was not equipped with an after anchor and that such method of anchoring was neither possible nor customary; and to show that "safe berth" means the customary, usual, and only available berth at the destination, not a berth where the barge would be insured of always being afloat at low water. Petition was denied (R. 131).

D. The Questions Presented.

1. Has a tug fulfilled her contractual obligation to "take the barge Harford from Red Hook Flats to the anchorage off Port Reading Coal Docks" (Federal Anchorage No. 42) by placing her tow

(a) at anchor within the designated anchorage?

(b) fully afloat on a still rising tide?

(c) in the deepest water and widest berth within the anchorage?

(d) at a berth accepted by the tow?

If not, no tug could accept a fully manned tow for anchorage at a designated point, or even within a well known Federal Anchorage, without assuming complete and future responsibility for the tow under any and all conditions of weather or tide which might subsequently ensue.

2. Is a tug an insurer of her tow or a mere contractor without further obligation to the tow after fulfillment of her contract of towage?

If the tug be an insurer of her tow then the decision of this Court in *Stevens* v. *The White City,* 285 U. S. 195, is overruled.

E. Reasons Relied on for the Allowance of the Writ.

It is respectfully submitted that this Court should take up this case on certiorari, set aside the decision of the Circuit Court of Appeals and reverse the decision of the District Court on the following grounds:

1. The decision of the Circuit Court of Appeals is inconsistent with the decision of this Court in *Stevens* v. *The White City,* 285 U. S. 195, where this Court held that a tug is not an insurer of her tow and has no control over the master and hands of the towed vessel beyond such as is required to govern the movement of the flotilla.

2. The decision of the Circuit Court of Appeals places new and affirmative burdens upon the tug which, in effect, would require the tug to assume and insure the safety, duties and obligations of a towed vessel after it has been left in its designated anchorage in complete fulfillment of a contract of towage.

3. The questions presented are of primary importance to our entire shipping industry. Unless the decision of the Circuit Court of Appeals is reviewed neither ship operators, towboat owners, nor any of the various marine insurance interests involved will any longer be able to contract with any certainty of their respective responsibilities.

McAllister Lighterage Line, Inc.
By:
Wilbur E. Dow, Jr.,

Dated, New York, May 7, 1947.

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No.

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Petitioner,

—against—

P. DOUGHERTY COMPANY, as owner of the Barge HARFORD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

For Opinions Below, Jurisdiction, Statement of Case and Questions Presented see pages 2 to 6 of the Petition.

POINT I.

A tug is not an insurer of her tow and when she places the towed vessel at the destination directed by the vessel's owner in a position as safe as conditions at such destination permit, she has fulfilled her contract, and the risk, if any, to the towed vessel remaining in that position is not the tug's.

The barge, manned by a crew of four, was taken to the best available berth in the anchorage grounds

to which her owner consigned her, and left there fully afloat at anchor. The Courts below charged the tug with liability not only for subsequent grounding of the tow at such destination, but also with liability for damages incurred by reason of the tow having dragged further ashore during a storm which later arose. The owner of the barge was fully chargeable with knowledge of conditions at the anchorage, because its barges had been going there continuously for more than 25 years. The tug fulfilled the contract when the barge was taken to the place directed by the barge owner and left at the best berth there available without the barge master's protest or inquiry. To place in such circumstances a burden of instruction and warning upon the tug, as the Courts below did, is, we submit, to make the tug an insurer of the tow's safety.

A barge master is the agent of the barge owner so far as care of the barge is concerned, and he is responsible for the internal economy of his vessel (R. 116); *The W. H. Baldwin* (CCA 2nd), 271 Fed. 411; *Dailey* v. *Carroll* (CCA 2nd), 248 Fed. 466, 468.

This Court, in *Stevens* v. *The White City*, 285 U. S. 195, 200, has said:

> "Decisions of this Court show that under a towage contract the tug is not a bailee of the vessel in tow or its cargo. * * *
>
> "The tug does not have exclusive control over the tow but only so far as is necessary to enable the tug and those in charge of her to fulfill the engagement. They do not have control such as belongs to common carriers and other bailees. They have no authority over the master or hands

> of the towed vessel beyond such as is required to govern the movement of the flotilla. In all other respects and for all other purposes the vessel in tow, its cargo and crew, remain under the authority of its master; and, in an emergency, the duty is upon him to determine what shall be done for the safety of his vessel and her cargo. In all such cases the right of decision belongs to the master of the tow and not the master of the tug. A contract merely for towage does not require or contemplate such a delivery as is ordinarily deemed essential to bailment."

The decision of the Circuit Court of Appeals in the instant case is inconsistent with the law as heretofore understood and as enunciated by this Court in *Stevens* v. *The White City, supra,* and cases there cited.

To require a towboat captain to volunteer instructions to the master of the towed vessel as to how he should anchor presupposes knowledge which a towboat captain could not possibly have:

1. The amount of cargo on board which has a great effect upon a barge's ability to remain at an anchor against the forces of the elements.
2. The weight, size and style of anchor and length of chain with which the barge is equipped and its ratio to the freeboard of the barge, on the one hand, as well as the barge's depth and weight, on the other.
3. The nature of the bottom and whether or not the barge's anchor is the type best calculated to hold in that type of bottom with reference to the factors contained in item 2 above.

4. The weather to be encountered during the ensuing period the barge is to remain at the anchorage (in the case at bar the barge was anchored in fair weather which was followed a few hours later by a severe storm that blew for two days, the proximity of which not even the Weather Bureau knew at the time the barge was anchored).

The calculations required properly to instruct a towed vessel, as outlined above, would require many hours and be subject to many variable factors. As a practical matter, it could not be done and would make a towboat the guarantor of the future safety of the tow irrespective of carelessness, negligence, stupidity or lack of a modicum of knowledge of his job on the part of the master of the tow.

It need only be pointed out that tugs offer their services for towing only and to require more would completely change the nature of their services, the cost of performing the work and the insurance they would be required to carry.

The effect of the decision of the Circuit Court of Appeals is to transfer the normal duties of the master of the towed vessel to the master of a tug. Needless to say such a harsh and unusual burden would place risk of all subsequent consequences to the towed vessel squarely upon the towboat owner. Litigation would not only be invited, but would be multiplied and unavoidable under any such rule. In lieu of established and settled principles of law, whereby the tug is deemed to have fulfilled her contractual obligation upon delivering the tow to her destination, there may be expected an endless, hopeless harangue of conflicting evidence between tug captain and barge master

as to instructions or warnings given; the status of the master of the tow would be reduced to mere servant of the tug having neither initiative nor responsibility.

Conclusion.

We submit that the questions here presented should be reviewed by this Court in the interests of a clarification and unification of the important commercial relationships between tug, tow and underwriters; that the decision of the Circuit Court of Appeals herein is contrary to the existing law as interpreted by this and other Courts in earlier decisions of long standing; that petitioner's prayer for a writ of certiorari be granted; and that multiple future litigation may thus be avoided.

Dated, May 6, 1947.

Respectfully submitted,

WILBUR E. DOW, JR.,
WILLIAM G. SYMMERS,
Proctors for Petitioner.

FILE COPY

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER E. HECKMAN,
Proctor for Respondent.

JUDICIAL PRINTING CO., INC., 82 BEEKMAN ST., N. Y.—BARCLAY 7—3648-9 182

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POINT I

The decisions of both Courts follow well established law.

Petitioner's argument disregards the testimony which both the District Court and the Circuit Court of Appeals recognized, that the order to petitioner to tow the *Harford* to anchorage was understood by petitioner to be an order to place the barge in a safe berth. Benze, petitioner's employee, who took the order, testified (R. 75):*

> "Q. And in all your orders to take barges to anchorage like Red Hook, Port Reading, Amboy, or whatever it might be, you understand that means to a safe anchorage, don't you? A. That is right, sir."

* References are to pages of the record.

The Circuit Court of Appeals stated the "orders were to put her (the *Harford*) in a *safe* berth" (R. 117). The District Court found that respondent gave petitioner an order to tow the *Harford* to "a safe anchorage" in the vicinity of Port Reading, New Jersey (R. 97).

Recognizing that a tug is not an insurer of the safety of its tow, but is liable only for negligence, the Circuit Court of Appeals said (R. 115-116):

> "In selecting a berth for her tow a tug is chargeable with 'such information as is current in the calling.' Waldie v. Steers Sand & Gravel Corp., 151 F. 2d 129, 131 (C. C. A. 2). Common knowledge ought certainly to include all that the charts of Geodetic Survey disclose about the bottom. These are available to all, and before undertaking a towing job either the tug's master must inform himself from them, or its owner must and instruct the master. In the case at bar it is true, the owner of the barge directed that she be left at the anchorage grounds; he did not, however, designate the precise place where she was to be anchored but left the selection of a safe berth to the appellant.
>
> * * * * * * *
>
> "* * * The testimony that other barges of equal size had previously been safely anchored within the anchorage grounds justifies the inference that the *McAllister* either chose a poor place for anchoring or an improper method of anchoring the barge; in either case she gave the *Harford* a foul berth and was properly held liable for ***negligence*** in so doing." (Italics supplied.)

The District Court stated in its second conclusion of law (R. 100):

> "The negligence of the tug *G. M. McAllister* in failing to place the barge *Harford* at a safe anchorage point was the sole and proximate cause of the damage to the barge *Harford*."

Thus it is obvious that, contrary to petitioner's assertion, the case does not involve the question of law whether a tug is an insurer. It involves only a question whether it was negligent for a tug to anchor a barge where under reasonably to be foreseen conditions of wind and tide, within two and a half hours after arrival the barge grounded and was damaged (District Court's conclusion No. 1, R. 99—C. C. A. Opinion, R. 115).

To accept petitioner's contention that a tug is bound only to bring the vessel to a point safe at the moment of arrival would, we submit, relieve her of any duty of reasonable care and exonerate her from liability for mooring a vessel at a point known to be dangerous at low tide although safe at high water. Such a ruling would constitute a radical change in long existing law.

O'Boyle v. *Cornell Steamboat Co.*, 298 Fed. 95;
The B B No. 21, 54 F. (2d) 532;
The Bleakley No. 76, 54 F. (2d) 530.

The record does not support petitioner's assertion that the *Harford* was moored in the "best available berth," "in the deepest water and widest berth within the anchorage." We have already quoted the statement of the Circuit Court of Appeals that the evidence of safe use of the anchorage ground by vessels of equal size "justifies the inference" that the tug chose a poor berth or an improper method of anchoring.

All of petitioner's arguments were considered and answered in the decisions of the Circuit and the District Courts. No new or important questions of law are involved.

CONCLUSION

The petition should be denied.

Respectfully submitted,

CHRISTOPHER E. HECKMAN,
Proctor for Respondent.